IN THE MATTER OF THE HUMAN RIGHTS CODE OF ONTARIO

and

IN THE MATTER OF THE COMPLAINT OF ANTHONY WONG
AGAINST OTTAWA BOARD OF EDUCATION AND A. WOTHERSPOON

INTERIM DECISION
(Motion to Amend Complaint)

INTRODUCTION

When the hearing into this matter resumed on June 22, 1993, counsel for the Commission moved to amend the complaint (exhibit 2) in the following terms set out in her letter of June 9, 1993, to counsel for the respondents (exhibit 4):

1. That the Ottawa Board of Education be named as the proper Corporate Respondent;

2. That the complaint be amended to reflect the proper section for racial harassment, namely section 5(2) formerly section 4(2) of the Code [i.e., the Human Rights Code of Ontario] and that section 6(2) be deleted;

3. The Commission will also request that the Board of Inquiry add section 11 (formerly section 10) of the Code to the complaint.

The first two proposed amendments were approved without objection and, having regard to an understanding reached by the parties, after hearing argument regarding the third amendment the hearing was adjourned to a date in September. For the reasons that follow I have decided to allow the Commission's motion to "add" section 11 of the Code to the complaint. Section 11 of the Code reads in part as follows:

> 11.-(1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited

ground of discrimination and of whom the person is a member, except where,

> (a) the requirement, qualification or factor is reasonable and bona fide in the circumstances; or
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> (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.

REASONS

Mr. Wong's formal complaint contains no allegations of overt discrimination. In it he alleges that in his fourteenth year of employment as a teacher at the Ottawa Technical High School the Principal, Mr. Wotherspoon, informed him that he was being placed on a "surplus list" because of his insufficient involvement in extra curricular activities. It is Mr. Wong's contention that he was placed on that list because of his race and ethnic origin.

The Commission's motion to add section 11 of the Code arises from its view that the transfer procedures of the Ottawa Board of Education set out in exhibit 3, and in particular the following paragraph thereof dealing with the need to declare staff members supernumerary, have an adverse discriminatory effect upon racial minorities:

> 2. Where a need exists to declare staff supernumerary, the Principal shall give consideration to the retention of teachers which will preserve the best balance of staff. Seniority is not to be used as the major factor in determining which teacher is to be required to transfer. Such factors as male-female ratio, age of staff, experience in teaching, provision for subject specialization, available staff for extra-curricular activities are the major elements to be used for this purpose.

Whereas the procedure expressly requires consideration of such factors as age and gender, the disregard of which might be discriminatory, it fails to require consideration of race,

ancestry, place of origin, colour and ethnic origin, and "the Commission contends that the absence of consideration for racial minority groups in the policy resulted in the exclusion of Mr. Wong from the school". (Exhibit 4.)

Counsel for the respondent argued that a board of inquiry lacks the jurisdiction to amend a complaint in this particular way, or to hear a complaint as so amended. In the alternative, he suggested three reasons why I ought not to accede to this particular motion even if I have the jurisdiction to do so: (1) "the substantial delay that has occurred from the filing of the complaint"; (2) the absence of "a substantial factual or evidentiary basis for the complaint [as so amended]"; (3) the want of "a prima facie case advanced that the amendment in fact has some hope of success".

The argument as to want of jurisdiction was based on the scheme of the Code as it relates to the responsibilities of the Commission. Once a complaint has been lodged the Commission is required to investigate it and to endeavour to effect a settlement. According to counsel for the respondent, Mr. Wong's complaint was simply that he was harassed and discriminated against because of race and ethnic origin. That complaint was investigated and, no settlement having been reached, this board was appointed to hear and decide it. In his opinion section 11 of the Code sets out an entirely different complaint that the Commission has neither investigated nor attempted to settle. It was submitted that the Commission has made no effort in respect of s.11 to satisfy itself that the procedure is appropriate and that the evidence warrants an inquiry. Moreover, the submission continues, the Commission has not requested the appointment of a board of inquiry with respect to what counsel appears to characterize as "a s.11 complaint".

In the course of argument counsel for the respondent stated that "throughout the course of this complaint the fact of the matter is that [it] has always been dealt with as if it were a

complaint of direct discrimination, which in fact is exactly what the complaint is that's been filed." (Transcript V.I, p. 24.) He went on to suggest that "What the Commission is trying to do here is to change the entire focus of this complaint from one alleging that he was selected [as supernumerary] because of race to one saying that the Ottawa Board of Education has a positive duty to consider race in making these selections, and that's an entirely different complaint, I submit, than the one that we started with in 1989". (V.I, p. 31.) Finally, in this regard he said that "[W]hat the Commission is trying to do ... is to basically institute a new complaint, it is trying to do so indirectly by tying this new complaint to the existing rather clearly direct discrimination complaint of Mr. Wong." (V.I, p. 34.)

With all respect, this argument seems to me to misconstrue section 11 of the Code which, in my view, cannot be read as providing a separate "ground" upon which a complaint under the Code may be brought. The "ground" of a complaint under the Code is the allegation of the infringement of a right for one of the reasons specified in the provision of Part I that confers that right. The grounds of Mr. Wong's complaint are, firstly, that his s.5(1) right to equal treatment with respect to employment without discrimination because of race and ethnic origin has been infringed, whether directly or indirectly (s.9) and, secondly, that his s.5(2) right to freedom from harassment in the workplace because of race and ethnic origin has been infringed, whether directly or indirectly. The complaint form also provides some particulars of the circumstances alleged to constitute infringements of Mr. Wong's rights. Section 11, which is found in Part II on "Interpretation and Application", neither creates new rights nor establishes additional grounds for relief. Rather, it stipulates (ex abundanti cautela, it would seem) one way in which a right conferred by Part I might be infringed, namely, constructively, and it provides a defence that may apply where it is alleged that that is the way in which the right was infringed.

In my view, what the requested amendment seeks to do is to add particulars as to how Mr. Wong's s.5(1) and s.5(2) rights were infringed. The Commission is not attempting to change the ground from "direct" discrimination to "indirect" discrimination and entirely recast the complaint. It is merely informing the respondents before the hearing of the complaint on its merits that in addition to whatever other evidence will be led as to how the complainant's rights were infringed it intends to lead evidence to show that the procedures established by the corporate respondent had an adverse discriminatory impact upon Mr. Wong thereby infringing his s.5(1) right constructively. The Commission's purpose in seeking to amend the complaint by adding a reference to s.11 is to provide notice to the respondents prior to a hearing on the merits so as to avoid the kind of difficulty that arose in the Quereshi case to which I will come presently.

In support of her motion to "add" s.11 to the complaint, counsel for the commission referred to Cousens v. Canadian Nurses Association (1981), 2 C.H.R.R. D/355 (Ont. - E.J. Ratushny) and Tabar and Lee v. Scott and West End Construction Ltd. (1982), 3 C.H.R.R. D/1073 (Ont. - P. Cumming).

At the outset of the hearing in Cousens the Commission moved to amend a complaint of discrimination in employment because of ancestry to include the additional grounds of discrimination on the basis of nationality and place of origin. This was met with the objection (at paragraph 3254) that "a respondent could be seriously prejudiced by coming to a hearing prepared to answer to a complaint on one ground, only to be met by evidence and argument in relation to a separate category of discrimination under the Code." Professor Ratushny "recognized the validity of the contention that prejudice could result" but went on to make this point (paragraph 3255):

> [S]ection 14c. of the Code suggests that the mandate of a board might well extend beyond the specific ground of contravention alleged in the complaint:

> 14.c. The board after hearing a complaint, (a) shall decide whether or not any part has contravened this Act ... [Emphasis added.]

> In other words, the board is required not merely to decide upon the specific ground of discrimination which has been alleged, but to hear the circumstances of the complaint as presented by the parties and decide whether or not any party has 'contravened this Act.' The written complaint is not, therefore, in the nature of an information or indictment in a criminal case. Rather, it serves as a general notice to a party in the administrative hearing.

The respondent in Cousens also made essentially the same argument as has been made before me in this case, namely, that the board did not have jurisdiction to deal with such additional grounds because (paragraph 3257):

> ... [I]f at any time subsequent to the appointment of a board of inquiry, another ground of discrimination becomes apparent, that additional ground of discrimination can only be considered if the Minister of Labour makes another appointment of a board specifying the additional ground.

Professor Ratushny went on to reject that argument, pointing out (at paragraphs 3258 to 3260) that:

> ... Section 14b(6) which deals with the jurisdiction of a board of inquiry, speaks in terms of the board "... reaching a decision as to whether or not any person has contravened this Act ..." Reference has already been made to section 14c(a). Moreover, section 14b(1)(e) specifically authorizes the board to join additional persons as parties to the complaint. Would it not be anomalous for a board of inquiry to be authorized to add new parties to the complaint but to be precluded from modifying the ground of the complaint against an existing party?
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> The wording of sections 14b(6) and 14c(a) are sufficiently broad to bear the practical interpretation that a board of inquiry has jurisdiction to amend the alleged grounds of contravention specified in a complaint. Surely, it was not intended that the Minister of Labour should have to make an additional appointment simply because, in preparation for the hearing, another possible ground of contravention has become apparent. It is clearly in the interests of all of the parties and

> the citizens of Ontario that the substantial complaint be dealt with at one hearing taking into account all of the possible ways in which any party may have "contravened this Act."
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> However, it must be emphasized that the jurisdiction to modify the alleged grounds of discrimination carries with it the obligation of providing adequate notice. Failure to provide sufficient notice to the parties and, where appropriate, the opportunity to adjourn for further preparation could result in a board of inquiry depriving itself of jurisdiction by failing to provide a fair hearing as required by section 8 of the Statutory Powers Procedure Act S.O. 1971 ...

Counsel for the respondents attempted to distinguish Cousens on the basis that there is no substantial difference between the ground of discrimination because of ancestry and the grounds of discrimination on the basis of nationality and of place of origin. While discrimination because of any of these three factors frequently coincides with discrimination because of one or both of the other two, the reasoning in Cousens was not so narrowly based and would clearly apply regardless of the ground sought to be added. For instance, in Sinclair v. Peel Non-Profit Housing Corporation (1990), 11 C.H.R.R. D/341, the board allowed a motion to add as a ground to the complaint discrimination because of "sex", a ground that is clearly distinct from all others. In Tabar and Lee v. Scott and West End Construction Ltd. (supra), after quoting the above passages, Professor Cumming (at paragraph 9543) said that: "The opinion expressed by Chairman Ratushny impresses me as a correct interpretation of the Code." The authority of a board of inquiry to allow additional grounds to be added to a complaint when the hearing commences is now well-established and, in any case, permitting the Commission to rely on s.11 of the Code does not add any new ground to the complaint.

Counsel for the respondents acknowledged that "there is some board jurisprudence suggesting or holding that an allegation of constructive discrimination need not be specifically pleaded in the complaint ... because section 11 can be understood to be part

of a complaint of discrimination. [But] that line of cases has to be reconsidered in light of the decision of the Divisional Court in Board of Education for the City of Toronto v. Quereshi [91 CLLC 16,249]."

There have indeed been a number of Ontario board of inquiry decisions in which constructive discrimination has been found even though s.11 (or its predecessor, s.10) had not been referred to in the complaint form. While at first reading the decision in Quereshi might appear to be inconsistent with that line of cases, and to require reliance upon section 11 of the Code to be spelled out in the original complaint form, I do not think the majority opinion delivered by O'Leary J. can be taken as going so far as to say that the complaint must refer to that section and that a complaint can never be amended so as to do so. If a complaint can be amended by adding fresh grounds under Part I, and by adding new parties to the proceedings, it would be astounding if it could never be amended so as to allow reference to s.11. And I might add in passing that, in my submission, provided the respondent has ample opportunity to meet fully an allegation of constructive discrimination, it is unnecessary that the complaint contain, or be amended to contain, an express reference to s.11 of the Code. What is required is administrative fairness, and that can be secured without such a reference.

O'Leary J.'s decision in Quereshi concludes as follows:

> In my view, the finding of discrimination made by the Board of Inquiry does not constitute discrimination under the Human Rights Code and in any event was not the discrimination that the Board of Education was asked to meet.

Thus, the primary reason for allowing the appeal was simply that the majority in the Divisional Court disagreed with the board of inquiry's finding of unlawful discrimination. As to the alternative reason, it is obvious that as a matter of procedural fairness a respondent must be given adequate notice of the case to

be met, and I read O'Leary J.'s decision as saying that there was a failure in that respect. He did not expressly hold that s.11 cannot be relied on unless referred to in the complaint form, either as originally framed or as amended. Rather, he indicated that in the peculiar circumstances of that case the issue of constructive discrimination (s.11) was never properly before the board for consideration. There was no notice that constructive discrimination would be relied on prior to the commencement of the hearing. Indeed, the Commission was not of the view that there had been constructive discrimination. The issue was first raised by independent counsel for the complainant at the commencement of the hearing to the surprise not only of the respondent but to that of the Commission whose counsel "was not aware that what [counsel for the complainant] was going to seek to do, in a sense, was to amend the complaint, to add Section 10 [now s.11]." While the board decided that in the circumstances it would be unfair to amend the complaint so as to include s.10 (now s.11), "in the event that evidence should be presented which constituted a blatant transgression of s.10, [it] would be prepared to hear submissions on whether an amendment should be permitted at that time." In fact, no amendment was subsequently sought, and it was not until hearing the reply evidence of the complainant that any possible basis for finding constructive discrimination emerged from the evidence, by which time (O'Leary J. appears to suggest) administrative fairness ought to have precluded reliance on it. I believe the following passages (beginning at p. 16,250) reflect this aspect of the Court's decision:

> We are informed by counsel that at no time thereafter [i.e., after the initial refusal to amend] during the hearing was any request made to amend the complaint. ...
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> It is clear then that the case against the Board of Education and the one it attempted to meet was that it had intentionally and directly and not by adverse effect, discriminated against Dr. Quereshi. ...
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> The Board of Inquiry also concluded that there was

> no evidence that the Board of Education intentionally discriminated against Dr. Quereshi and if discrimination took place it was unintentional.
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> Since the Board of Education was meeting a charge of intentionally and directly discriminating against Dr. Quereshi, that finding by the Board should have ended the matter. Had it been alerted that it was being asked to meet a charge of systemic or adverse effect discrimination, the School Board would have elicited evidence on this charge from the witnesses it did call and would have called additional expert and lay witnesses on the point.

Counsel for the respondents referred to the decision in Ouimette v. Lily Cups Ltd. et al. (1990), 12 C.H.R.R. D/19, as additional authority for his submission that I am without authority to allow the amendment sought. However, in that case the board of inquiry did not deny its jurisdiction to amend the complaint. Rather, it refused a request to do so which was made in the second day of the hearing after crucial evidence had already been adduced. In so refusing, and after stating that "the proposed complaint amendment came after the very important testimony of the complainant" the board used language that the present respondent finds apt (at p. D/21):

> ... there is the simple fact that more than three years had passed from the time of complaint. The matter was at hearing. Through fact finding and conciliation, the issues had been crystallized. It was wrong of the Commission at so late a date to put a potentially new cast on the proceedings. The time to have investigated had long passed.

I regard this statement as somewhat rhetorical. It cannot be stretched so as to suggest that in every case, regardless of the circumstances, once the fact finding and conciliation process has ended the issues are "crystallized" and that motions to amend are wrongful attempts to put a "new cast on the proceedings" requiring further investigation the time to indulge in which has long passed, particularly if more than three years have expired from the issuance of the original complaint. Ouimette is simply a case in

which a board exercised its discretion by denying a motion to amend. Clearly every request to amend a complaint must turn on the peculiar facts and the surrounding circumstances of the case in which it is made. The circumstances before me are quite different from those before the board in Ouimette. Indeed, as counsel for the Commission pointed out, the purpose of the present request is to avoid the kind of problem that arose in Ouimette.

I turn now to the respondents alternative submission that, assuming I have jurisdiction to make the amendment, "it would be contrary to the rules of fairness and the rules of administrative law to permit counsel for the Commission to now change the ground of the complaint." The first basis for this submission is that of "delay". In this regard counsel referred to Motorways Direct Transport Ltd. v. Canadian Human Rights Commission, 16 C.H.R.R. D/459 and the discussion therein of Saskatchewan Human Rights Commission v. Kodellas and Tripolis Foods Ltd., 10 C.H.R.R. D/6305.

Motorways concerned a complaint of discrimination because of disability, namely, alcoholism. The complainant's career with Motorways began in 1963 and ended with his dismissal in 1984 following several instances of disciplinary action over the years taken by eight different supervisors for such matters as intoxication on the job, only one of these supervisors being any longer available to give evidence. His grievance from that action was dismissed by an arbitrator in March of 1985. Two years later he filed his first complaint which was not dealt with by the Canadian Human Rights Commission until September of 1988. A second complaint, filed in July of 1988, was accepted by the Commission in November of that year. When in June of 1990 the officer to whom the Commission had assigned the file some eighteen months earlier decided to begin a fresh investigation into the matter, Motorways brought this motion to quash the two decisions of the Commission accepting the complaints and to quash the continuation of the Commission's investigation. Having found that the Commission had valid reasons for accepting the complaints such that it had not

acted with procedural unfairness despite the prolonged delay in doing so, Walsh J. went on to quash the further investigation of the matter because of the total delay from the filing of the complaints and the considerable additional delay that would otherwise inevitably be encountered before a hearing could be held.

In Motorways, an order quashing the proceedings against the respondent was sought in circumstances and having regard to delays that are insufficiently analogous to be helpful in the present case. However, I was asked to review with particular attention Walsh J.'s discussion of the Kodellas case. That case concerned allegations of sexual harassment analogous to criminal misconduct, and it involved an application for a stay of the proceedings which application turned on s.7 of the Canadian Charter of Human Rights.

As it happens, I had occasion to consider both Motorways and Kodellas extensively in Ghosh v Domglass Inc. et al.. 16 C.H.R.R. D/16, in which interim decision I made the following statements that seem particularly relevant to the present circumstances:

> ... I do not read **Kodellas** as propounding the proposition that delay that is unreasonable for whatever reason is ipso facto a breach of the rules of natural justice.
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> ... Finally, if my criticism of **Motorways** (which I do not regard as binding upon me) is misplaced, there remains the need to compare the unreasonable character of the delay therein with that involved in the circumstances before me. I find significant the following observations made in **Motorways** by Walsh J. (at page 13 or 14):
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> > ... it appears to me that the criteria set out in Kodellas as to what is an unreasonable delay are also applicable in considering the duty of fairness. Since the date of the investigator's report that an inquiry was warranted, no decision has yet been made to initiate it. An examination of the record discloses, however, that this will most likely be the result of the report in view of the issues which the Commission itself has indicated it wishes to have determined in this case. I have already indicated that the prejudice to Motorways is great. To require it to await an

> investigator's report, referral to the Commission, and enquiry before the Commission involving very extensive evidence and expense which may well be a waste of time for all parties does not seem justified. Far too much delay and prejudice to the plaintiff has occurred already which justifies a conclusion that the decision to proceed with an investigation is in itself a decision approved by the Commission. This has not been made fairly in regard to the Plaintiff. ... [After indicating that the decisions to accept the complaints were properly accepted, the reasons then conclude as follows.] ... What I am now deciding however is, assuming the complaint was validly accepted, whether the delays from February 9, 1987 to September 27, 1988 while the Commission was deciding whether to accept the complaint or not, and more especially the subsequent delays in investigating this and the subsequent Section 10 complaint with respect to which complaints Ms. Redding [the Human Rights Officer] only commenced her investigation in June of 1990 was not unacceptably long, and that the delays which are so prejudicial to Plaintiff breach the duty to act fairly. I therefore direct that a writ of certiorari be issued against Defendant quashing its decision to proceed with an investigation of [the] claims against the Plaintiff and a writ of prohibition preventing it from proceeding with these claims.

... [I]n Motorways, although coloured by the cumulative effect of earlier dilatoriness, the delay that proved fatal to the decision under attack was prospective. By way of contrast, there was no prospect at the time they were made that the decisions under attack in the present proceedings would in and of themselves risk unreasonable future delay, and in fact no such delay has materialized. For that reason, even if it were correct and otherwise applicable, I would distinguish the Motorways case and follow the clear trend of the Ontario decisions dealt with below, some of which involved delays comparable to those that have occurred in this case with similar problems of fading memories and difficulties in locating witnesses.

Similarly, the motion to add a reference to s.11 of the Code in the present case involves no prospective delay other than the

adjournment of the hearing to September occasioned by the fact that the motion is contested. And even in that regard counsel for the respondents expressed his satisfaction that "given the dates we have agreed upon that we will have adequate time to prepare a reply to the Commission's case as we understand it from [exhibit 4]." (V.I, p. 64.)

As to any unfair effect it might have upon them, the only prejudice to the respondents suggested as a possible consequence of allowing this motion was that if the transfer procedures are found discriminatory other potential complainants to whom it has been applied over the four years since this complaint was filed might now come forward. However, since the rejection of this motion would not amount to a decision that the policy is not discriminatory it would not impede other potential complainants from coming forward with charges of constructive discrimination occurring since Mr. Wong's complaint was filed. Moreover, if the application of that policy amounts to constructive discrimination infringing Mr. Wong's rights under the Code, that others might have been similarly wronged and might now make similar claims cannot stand as a valid reason to deny Mr. Wong the relief he seeks.

It was suggested by counsel for the respondents that "when the Commission comes before a board of inquiry asking to amend by adding a provision like section 11, basically a new complaint, then it must have a substantially evidentiary or factual basis to support the application of that section ... [and] ... there isn't even a prima facie case before us of any violation of section 11." (V.I, pp. 47 & 48.) As already indicated, to add to the complaint a reference to s.11 is not to add a new complaint dependent on a different set of facts and circumstances that have so far gone uninvestigated. Rather, it is simply to alert the respondents to the Commission's intention to attempt to persuade this board to a particular interpretation of the procedures that the respondents themselves claim to have applied to Mr. Wong so as to avoid any element of surprise as the hearing on the merits unfolds. In my

opinion, it is inappropriate to speak in terms of the need either to provide "substantial evidence" that s.11 applies, or to make out a prima facie case that it does. The issue does not depend on a different set of facts than would otherwise emerge, but upon the interpretation of those facts in light of the School Board's own procedures. Not only is the letter of June 9 (exhibit 4) sufficient to engage this issue, but the Commission has undertaken to provide the respondents with further details of its position in this regard prior to the resumption of the hearing. (See V.I, p. 64.)

I am satisfied that there is nothing before me that would support an allegation of administrative unfairness, or of a denial of natural justice, in allowing this motion. As the respondents have acknowledged that they now have sufficient time to prepare to meet the allegation of constructive discrimination, and there being no other possible prejudice to them in my so doing, and having regard to the broad policy of the Code as enunciated in such decisions as that of the Supreme Court of Canada in O'Malley v. Simpsons-Sears Limited, 7 C.H.R.R. D/3102, I have concluded that it would be wrong of me to fail to exercise my discretion in favour of allowing this motion.

DECISION

For the reasons I have stated, the Commission's motion to amend the complaint so as to contain a reference to Section 11 of the Code is hereby allowed.

Dated this 9th day of July, 1993.

H.A. Hubbard,
Chairperson